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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-32

CURTIS C. FLOOD, *Petitioner*,

v.

BOWIE K. KUHN, ET AL., *Respondents*.

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 443 F.2d 264. [A. 125] * The opinions of the District Court for the Southern District of New York (Cooper, J.) (R. 48A, 108A, 127A) are reported at 309 F. Supp. 793, 312 F. Supp. 404 and 316 F. Supp. 271. [A. 54, 83, 95]

* The bracketed references are to the separate single appendix filed in this Court. The references in parentheses are to the joint appendix used in the Court of Appeals.

JURISDICTION

The Court of Appeals entered judgment on April 7, 1971. [A. 141] A timely petition for certiorari was filed on July 6, 1971. Certiorari was granted on October 19, 1971. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Finding itself in "a most frustrating predicament," and blaming the "vagaries of fate," the Court of Appeals confessed it was helpless to decide this case properly. Accordingly, it declined to determine the lawfulness of Organized Baseball's "reserve system" under either federal antitrust law or state statutory or common law. On the one hand, the court regarded itself as "compelled" to follow *Federal Baseball Club* v. *National League,* 259 U.S. 200 (1922) and *Toolson* v. *New York Yankees,* 346 U.S. 356 (1953)—the concededly anomalous decisions of this Court which held that Organized Baseball is not "interstate commerce." On the other hand, the court rejected petitioner's state law claims for precisely the opposite reason—that Baseball *is* "interstate commerce" and somehow entitled to immunity from state regulation.

The questions presented are:

(1) Should not this Court, in the exercise of its supervisory power, rectify this bizarre result and thus preserve "public faith in the judiciary as a source of impersonal and reasoned judgments," *Moragne* v. *States Marine Lines,* 398 U.S. 375, 403 (1970)?

(2) Have not subsequent decisions of this Court, and developments in professional sports, so undermined *Federal Baseball Club* and *Toolson* that they may no

longer shield Organized Baseball's reserve system from the federal antitrust laws?

(3) Even assuming *Federal Baseball Club* and *Toolson* are to stand, may Organized Baseball be insulated from all state antitrust regulation, thus creating a unique "no-man's land"?

(4) May the federal courts curtail the reach of all state antitrust statutes on a wholesale basis, without conducting any "particularized inquiry" into the nature of the statutes or their impact upon interstate commerce, and with no finding that they violate any federal constitutional provision, or conflict with any federal statute or with one another, or intrude into an area which Congress has affirmatively found should be free of state antitrust regulation, or discriminate against interstate commerce?

(5) May Organized Baseball continue successfully to maintain:

(a) to the courts: that only Congress can correct the abuses of Baseball's reserve system;

(b) to the Congress: that the courts are adequate and legislation unnecessary;

(c) to proponents of federal regulation: that state regulation suffices; and

(d) to proponents of state regulation: that federal regulation alone may be applied?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The texts of the Commerce Clause of the Federal Constitution and the Thirteenth Amendment thereto, and the texts of Section 1 of the Sherman Act, 15 U.S.C. § 1, 42 U.S.C. § 1994, 18 U.S.C. § 1581, 29 U.S.C.

§§ 102 and 103, and the applicable state statutes are set forth in the statutory appendix to this brief, Appendix A.

STATEMENT OF THE CASE

1. The Complaint

Petitioner Curtis C. Flood [hereinafter Flood] brought this action in the United States District Court for the Southern District of New York to challenge the legality, under federal antitrust and state statutory and common law, of Organized Baseball's "reserve system." This is the scheme which binds every American professional baseball player to one team, or its assignee, for life, and which compels team owners, whether competitors or not, to boycott the player property of another team owner—and to boycott any fellow owner who fails to abide by the agreement among the owners to eliminate competition in the recruitment and retention of personnel.[1]

Flood's suit arose out of the October 1969 "trade" by which the St. Louis Cardinals—for whom he had

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[1] The reach of the reserve system in fact extends far beyond national, continental and even hemispheric lines. Marvin Miller, Executive Director of the Major League Baseball Players Association, testified below that an American player black-listed by Organized Baseball today finds himself boycotted by Japanese employers as well. (R. 163-64) [A. 166] As long ago as the 1940s, Organized Baseball manifested the extra-national force of its system, blacklisting players for five years who had "jumped" to Mexico to earn a better living at their trade. See *Gardella v. Chandler*, 172 F.2d 402 (2d Cir. 1949); *Martin v. National League Baseball Club*, 174 F.2d 917 (2d Cir. 1949) (L. Hand, J.). The Washington Post, on December 11, 1971, reported that former major league third baseman Clete Boyer had been traded by the Hawaii Islanders to the Taiyo Whales of the Japanese Central League, assertedly the first such "inter-hemispheric" trade.

played for twelve years as a star centerfielder and frequent .300 hitter (R. 35-36) [A. 144] —traded him in a multi-player transaction to the Philadelphia Phillies. Despite his long service, his position as Cardinal co-captain (R. 40) [A. 146], his stature as reflected in his $90,000 salary (R. 38) [A. 145], and his deep business and personal roots in St. Louis (R. 51-53) [A. 150-51], he had not been consulted about the trade. His "owner" told him about it only after the fact. Notice consisted of a telephone call and a printed form "Notice to Player of Release or Transfer." Those portions of the form which did not apply to him were crossed out. (Pl. Ex. 1, R. 27A, 48-50) [A. 35-36] Flood's right to any voice in the matter had presumably been irrevocably forfeited fourteen years earlier when, at the age of 18 and without the assistance of an attorney or any other advisor, he signed his first professional baseball contract for an annual salary of $4000. (R. 13-15) [A. 143]

On December 24, 1969, Flood wrote to the Commissioner of Baseball, Respondent Kuhn, asserting his right to negotiate with teams other than Philadelphia, and stating

> "After twelve years in the Major Leagues, I do not feel that I am a piece of property to be bought and sold irrespective of my wishes. I believe that any system which produces that result violates my basic rights as a citizen and is inconsistent with the laws of the United States and of the several states." (Pl. Ex. 4, R. 29A, 71-72) [A. 37]

Kuhn replied that while he agreed with the contention "that as a human being you are not a piece of property to be bought and sold" and that this "is fundamental in our society," he could not "see its applic-

ability to the situation at hand." (Pl. Ex. 5, R. 30A, 73-74) [A. 38-39]

Flood filed suit only after the Commissioner of Baseball thus denied his request that he be made a "free agent," at liberty to seek employment with other teams, and without subjecting a new employer to boycott by the team owners. His attack focused on Organized Baseball's interrelated set of rules and agreements which purported to require him—at age 32—to acquiesce in his involuntary sale to Philadelphia or abandon his highly successful career.

The complaint (R. 6A) [A. 6] was filed in federal district court on January 16, 1970 against the twenty-four major league teams comprising both major leagues, the presidents of the two leagues, and the Commissioner of Baseball. Count I charged that defendants violated the federal antitrust laws by their reserve system and their insistence that Flood play baseball in Philadelphia or nowhere, and that no other team owner negotiate with him without Philadelphia's permission. Count II, based on diversity of citizenship and naming eleven defendants, asserted that the reserve system and defendants' boycott violated the antitrust laws of New York, California and other states, as well as civil rights statutes. Count III, which named thirteen defendants, asserted that the reserve system and the boycott violated the common law. Count IV charged thirteen of the defendants with imposing upon Flood a form of peonage and involuntary servitude proscribed by 42 U.S.C. § 1994, 18 U.S.C. § 1581, and the Thirteenth Amendment to the United States Constitution, as well as depriving him of his "freedom of labor" in violation of 29 U.S.C. §§ 102 and 103.

Flood sought a declaration that the reserve system is unlawful, an injunction against the boycott, and triple the monetary damages he has sustained since December 30, 1969.

Despite the offer of a lucrative salary and his awareness of the damage a long layoff would wreak on his playing ability at this stage of his career,[2] Flood out of principle declined to play for Philadelphia, and accordingly missed the entire 1970 season.

Flood adhered to his refusal to play for Philadelphia during the protracted litigation below. But when Philadelphia sold its exclusive right to negotiate with Flood to the Washington Senators after the 1970 season concluded, financial necessity compelled him to acquiesce. By agreement among the parties to this litigation, Flood's decision to accept Washington's terms for the 1971 season was without prejudice to this case. Events showed, however, that the year's forced layoff had eroded his skills. He left the team early in the 1971 season and is not now playing in Baseball.[3]

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[2] See *Denver Rockets* v. *All-Pro Management, Inc.*, 325 F.Supp. 1049, 1057 (C.D. Calif. 1971) (finding of irreparable harm where boycott imposed layoff even on a young ballplayer).

[3] Agreement among the parties is not, of course, conclusive on mootness. But these events clearly do not moot this case, in which Flood seeks treble monetary damages. The success of a boycott, after all, cannot insulate it from judicial scrutiny. See *Radovich* v. *National Football League*, 352 U.S. 445 (1957), where the complainant was granted judicial relief from professional football's reserve system after a boycott had ended his career. Like Radovich, Flood has been damaged by the group boycott complained of, having lost his total salary for 1970 of over $100,000 and suffered impairment of his career. He, too, is entitled to dissolution (or domestication) of the reserve system and to appropriate compensation.

2. In the District Court

Flood promptly sought to restrain, during the pendency of the litigation, the boycott which prohibited teams other than Philadelphia from negotiating with him. On March 4, 1970, District Judge Irving Ben Cooper denied this preliminary relief. 309 F. Supp. 793. (R. 48A) [A. 54] However, on April 23, 1970, he also declined to grant defendants' motions for summary judgment on Flood's principal claims, holding that a full trial was essential for their adjudication. 312 F. Supp. 404. (R. 108A) [A. 83]

The case was tried over a three-week period to Judge Cooper, sitting without a jury. The reserve system was demonstrated to be a closely interrelated set of agreements and provisions—many of which do not themselves appear in the Uniform Player's Contract[4]—which uniquely restrict both player and team owner freedom. For example, Major League Rule 3(a)[5] requires every player to sign a standard form contract, and forbids any team from offering a non-uniform contract without the Commissioner's consent. The record shows that the Commissioner of Baseball has *never* permitted deviation from the imposed terms of that contract. (R. 153) [A. 160] Section 10(a) of the

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[4] A copy of the contract was appended to the complaint and appears at R. 23A-26A. [A. 19-35]

[5] The Rules were Pl. Ex. 6. [See Blue Book] Rule 3(a) is described at 316 F.Supp. at 274 n. 4. (R. 136A) [A. 99] Note that although this discussion is couched in terms of the "Major League Rules," a parallel set of provisions—the "Professional Baseball Rules"—eliminates competition in the recruitment and retention of the vast majority of minor league players who are not under major league contract. They suffer the same restrictions on their freedom to seek and obtain employment as do their major league brethren, and at markedly lower salaries.

Contract provides that if a player does not sign with the club which had his last contract by March 1, the team owner may *unilaterally* renew his contract and cut his salary. (R. 25A) [A. 29-30] Each renewed contract contains the same renewal provision. 316 F. Supp. at 274 n. 4. (R. 136A) [A. 99] Section 6(a) and Rule 9 authorize a team owner to assign a player's contract to any other owner, without consultation with the player and without his consent. 316 F. Supp. at 274 n. 7. (R. 24A, 139A) [A. 101] Any player or team owner who violates any part of this intricate system of rules may be boycotted by all other team owners. (R. 162-163) [A. 165-66] A team owner and player cannot even agree between themselves to allow the player to become a free agent, for Rule 8 requires that all other major league teams must be given an opportunity to purchase his contract. 316 F. Supp. at 275 n. 11. (R. 140A) [A. 101] Thus, the contract in toto, and the related rules and agreements, bind the player to the team that "owns" him, or its assignee, in perpetuity.

In 1965, the reserve system was extended for the first time to potential new players who have never signed an agreement with any team. Typically, these are teen-agers just graduated from high school, or who have dropped out of high school for one year. A semi-annual draft was devised wherein a drafted potential new player may only bargain with that team owner who chose him in the involuntary draft. (R. 145-149, 251-254) [A. 155-58, 187-88] No longer is it possible for a young man wanting to play professional baseball to select even his *first* employer.

The District Court found that Baseball's reserve system "is not presently collectively agreed to." 309 F. Supp. at 806 n. 51. (R. 89A) [A. 75] It was

not part of the Basic Agreement negotiated in 1968 between the team owners and the Major League Baseball Players Association,[6] which agreement provides only for "review" of the issue and expressly exempts it from bargaining during the life of the agreement. *Ibid.* No collective bargaining agreement of any kind exists between minor league players, who are totally unorganized, and their owners. In both major and minor leagues, each player's contract negotiation has always been an individual matter between himself and the team owner. The Players Association does *not* negotiate contracts for any player. In fact, it has been Baseball's historic position that players may not be accompanied in contract negotiations by any attorney, representative, or translator—even when, as is now often the case, the player is a Latin American who speaks little or no English. (R. 278, 1037) [A. 192-93, 289]

The reserve system and its implications were explored in the crucible of a three-week trial, "the first time in almost fifty years [that] opponents and proponents of the baseball reserve system have had to make their case on the merits and support it with proof in a court of law." 316 F. Supp. at 284. (R. 172A) [A. 120] Former ball players, former team owners, executives from other sports, the executive director of the Major League Baseball Players Association, and a distinguished economist testified on behalf of petitioner. With one exception, the witnesses for respondents were the respondents themselves or their employees.

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[6] The Association, organized in 1966 on a full-time basis, represents only the 600 or so major league players in dealing collectively with the major league owners and the Commissioner. (R. 140) [A. 154-55]

Flood pressed the court to declare the reserve system a *per se* violation of federal antitrust law; and contrary to state law. In the event the court declined to apply the *per se* rule, he adduced evidence to show that the reserve system was unreasonably restrictive and that much less restrictive alternatives were available.[7] The trial court ultimately declined to decide the issues on their merits. It held that it was foreclosed from doing so by decisions of this Court which allegedly put Organized Baseball's reserve system beyond the reach of both federal and state law. 316 F. Supp. 271. (R. 127A) [A. 120-21]

3. The Appeal

On April 7, 1971, the Court of Appeals for the Second Circuit concluded that it was "compelled to affirm," but confessed its inability properly to dispose of the case on its real merits. 443 F. 2d 264. [A. 126]

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[7] These alternatives, as listed by the trial court, 316 F.Supp. at 275 n. 12, (R. 140A) [A. 102] were:

> "Modifications of and alternatives to the present reserve system suggested by plaintiff include: (a) independent competitive leagues; (b) limitation of club control over a player to a fixed term of years; (c) permitting a player to become a free agent after an option period; (d) trade veto for veteran players; (e) minimum salary progression; (f) reduction in the number of reserved players; (g) salary arbitration. Consideration was given them both individually and in combination. Various refinements were advanced to meet certain objections raised as to proposals (b) and (c), including a right of first refusal given to the player's club to match any offer obtained by the player, a restriction of negotiations to only clubs in the other league and then only in the off-season, and/or a more equalized division of baseball revenues among clubs. See Tr. 221-22, 235, 237-38, 247, 255-58, 1966-67, 1981-84, 1985-86, 2020-23."

Through Judge Waterman, the court thus summarized the "predicament" in which Flood was placed:

> "On the one hand, the doctrine of stare decisis binds the plaintiff because of an initial holding that baseball is not 'interstate commerce' within the Sherman Act, and, on the other hand, after there have been significant changes in the definition of 'interstate commerce,' he is now told that baseball is so uniquely interstate commerce that state regulation cannot apply." 443 F. 2d at 268. [A. 131]

The court held that, as a lower court, it was obliged to follow this Court's ruling of a half century ago, in *Federal Baseball Club* v. *National League,* 259 U.S. 200 (1922), that Organized Baseball is not subject to the Sherman Act because its "exhibitions," involving "personal efforts, not related to production," were local affairs and not "trade or commerce." The court conceded that *Federal Baseball Club* and *Toolson* v. *New York Yankees,* 346 U.S. 356 (1953), which declined to overrule it, were "seemingly inconsistent" with the Court's later decision in *Radovich* v. *National Football League,* 352 U.S. 445 (1957), that professional football's similar, but less onerous, reserve system was subject to the Federal antitrust laws. 443 F. 2d at 266. [A. 127] Nonetheless, it concluded it was not itself free to set aside *Federal Baseball Club* and *Toolson.* Relief, it said, must come from this Court. 443 F. 2d at 268. [A. 128]

As to petitioner's state law claims, the Court of Appeals impaled Flood on the second horn of a dilemma which, Judge Waterman confessed, put him "in a most frustrating predicament." 443 F. 2d at 268. [A. 131] Although Baseball was held not

"interstate commerce" for federal purposes, the court held that, for purposes of state law, Baseball not only is "interstate commerce," but is so "uniquely interstate" as to preclude state regulation. It conceded that state antitrust regulation is ordinarily not preempted by federal antitrust law. *Giboney* v. *Empire Storage Co.*, 336 U.S. 490, 495 (1949). But it ruled that the states' interest in antitrust regulation must be subordinated to Baseball's asserted need to be free from compliance with the "strictest state antitrust standard," whatever that might be. *Ibid.*

The court admitted the incongruity of thus giving Flood the worst of both worlds. But it disclaimed responsibility:

> "Any apparent inconsistency results not from faulty logic, but from the vagaries of fate and this court's subordinate role to the Supreme Court." *Ibid.* [A. 132]

SUMMARY OF ARGUMENT

This Court is not compelled by considerations of its place in the federal judicial system to acquiesce in such an embarrassingly unsatisfactory result. The time has come for the 1922 decision in *Federal Baseball Club* that Organized Baseball was not "interstate commerce," a decision long conceded to be an anachronism, to be explicitly overruled and for Organized Baseball's present reserve system with its new involuntary draft to be subjected to federal antitrust law as are professional football, basketball, hockey and other professional sports. *Toolson* does not stand in the way of such an overruling. Decisions of this Court subsequent to *Toolson* and developments both in other professional sports and in Organized Baseball itself demonstrate that the considerations which led this

Court in 1953 to decline to overrule *Federal Baseball Club* no longer apply.

Second, and wholly apart from the fate of *Federal Baseball Club* and *Toolson,* this Court should make clear that state antitrust laws *do* apply to the practices in question. It was only in the context of forceful representations by Organized Baseball to the effect that state and local regulation of the reserve clause would suffice to remedy abuses that this Court decided both *Federal Baseball Club* and *Toolson.* The court below not only failed to give appropriate weight to this circumstance, but erroneously preempted the entire body of all state antitrust law without examining the law of any single jurisdiction, without the required "particularized inquiry" into the impact of any state law upon interstate commerce, and with no mandate from Congress to preempt. In so doing, the court below seriously departed from the judicial technique mandated by this Court for assessing state regulatory schemes against the Interstate Commerce Clause of the Federal Constitution.

Finally, Baseball should not be allowed once again to attain immunity from the rule of law by arguing that the gross abuses which characterize its reserve system must be dealt with, not by the forum at hand, but by "still another forum." To this Court, Baseball argued in 1921 and 1953 that it was to states and local governments that complainants must look for redress. To Congress, Baseball has argued that the courts or state legislatures were the appropriate bodies to remedy the defects. And in both state and federal court, Baseball has argued that it is legislative, and not judicial, redress that is appropriate. Having exhausted all such avenues of evasion, Baseball now seizes upon a new one. Baseball now argues that the

problem is one neither for the courts nor the legislatures, but rather for the collective bargaining table and the National Labor Relations Board. This position wholly misconceives the relationship between the national labor relations laws and federal and state antitrust law. We have here a concerted agreement among business enterprises to eliminate all competition in the recruitment and retention of personnel, an agreement enforced by a nation-wide, and indeed world-wide, boycott of any player or member enterprise who fails to observe the agreement. Such agreements among businessmen are not insulated from the antitrust laws simply because the competition which they seek to eliminate involves recruitment and retention of personnel. This is particularly true in an industry like Baseball where playing careers are exceedingly short—and hence collective bargaining power is weak, where only a small portion of the players are organized and participate in any kind of collective bargaining, where the agreement in question was not collectively agreed to even by the minority of organized players, where discretionary power to transfer or bench a player is unfettered, and where the blacklist used to enforce the scheme is industry-wide in its scope.

ARGUMENT

I. ORGANIZED BASEBALL'S RESERVE SYSTEM IS BOTH SUBJECT TO AND A PER SE VIOLATION OF FEDERAL ANTITRUST LAW.

It is beyond dispute that Organized Baseball today is a business, big business. Its owners are businessmen—or, in some cases, giant corporations selling everything from beer to television time.[8] As one of

[8] See generally Durso, "The All-American Dollar: The Big Business of Sports" (1971).

Baseball's own witnesses expressed it at trial, "Skill is the *commodity* that you are dealing with in baseball." (Emphasis supplied.) (R. 1297) [A. 299]

The Sherman Act has long prohibited businessmen from entering into concerted agreements to eliminate competition among themselves in the procurement of commodities essential to their businesses. *Mandeville Island Farms, Inc.* v. *Crystal Sugar Co.*, 334 U.S. 219, 241-242 (1948) (agreement among all sugar beet refiners to offer only a uniform contract to all local growers of sugar beets); *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). And businessmen are plainly prohibited by the Act from utilizing concerted refusals to deal, or group boycotts. *United States* v. *General Motors Corp.*, 384 U.S. 127, 145-147 (1966); *Klor's Inc.* v. *Broadway-Hale Stores*, 359 U.S. 207 (1959) (boycott of a single trader unlawful); *Fashion Originators' Guild* v. *F.T.C.*, 312 U.S. 457 (1941).

There is little question but that Organized Baseball's reserve system falls squarely within these *per se* proscriptions. Before the *Toolson* decision, Judge Frank so concluded in *Gardella* v. *Chandler*, 172 F.2d 402, 408-415 (2d Cir. 1949) (separate opinion), noting that before *Federal Baseball Club* both federal and state courts had repeatedly refused to enforce Baseball's reserve clause on the ground of its invalidity. And his brother, Judge Learned Hand, added that "one of the oldest and best established" of the restraints of trade forbidden even by the common law "is a contract which unreasonably forbids anyone to practice his calling." 172 F.2d at 408. More recently, professional basketball's rules seeking to "regulate" compe-

tition in the recruitment of personnel were preliminarily enjoined on federal antitrust grounds, and partial summary judgment has been entered against basketball. *Denver Rockets* v. *All-Pro Management, Inc.*, 325 F.Supp. 1049 (C.D. Calif. 1971). See *Haywood* v. *National Basketball Ass'n*, 401 U.S. 1204 (1971) (Douglas, J.).

Respondents have suggested that petitioner is somehow inconsistent in contending that the present reserve system involves *per se* violations of the federal antitrust laws, while conceding that he does not seek the total eradication of all measures to assure some degree of player continuity and team balance. This is no contradiction, for petitioner has argued alternatively that the reserve system and its boycott are unlawful, whether a *per se* rule or the "rule of reason" is applied. It is his principal contention that, to the extent Organized Baseball's reserve system eliminates all competition in the recruitment and retention of personnel, and achieves enforcement by resort to concerted refusals to deal or group boycott, *per se* violations are involved. He has no obligation to demonstrate how Baseball should be run. It has never been the office of an antitrust plaintiff to do more than show the illegality of the challenged practice and the injury to himself. He need not reorganize defendant's business for him, or procure a declaratory judgment that the suggested reorganization complies with the law. If he prevails and the practice is struck down, there will be time enough to eliminate what has been found to be unlawful, and to bring Baseball into compliance with the law.

Flood has, however, demonstrated that there are a wide range of less onerous alternatives available to Baseball. These alternatives, which include permit-

ting a player to play out a short option period as is now done in football and basketball, allowing compensation to the team which loses a player to another as professional basketball now arguably proposes, requiring some period during which a player cannot become a free agent, or some combination of these or other alternatives, were before the trial court. They are relevant to whatever relief is fashioned, and to decision on illegality should the *per se* rule not be held applicable.[9]

Experienced baseball men—Bill Veeck, who ran three major league teams and two minor league teams over 35 years, and Hank Greenberg, both star player and respected team executive—testified to the feasibility of these and other proposals and to their readiness to invest in Baseball after the present reserve system is eliminated. (R. 1961-86, 238-241) [A. 384-397, 180-181]

One thing does emerge with clarity. The present arrangement, the most restrictive in the world of professional sports, is unlawful, and Organized Baseball must follow other sports in devising less onerous restrictions upon the competition for player personnel. Compare *Denver Rockets* v. *All-Pro Management, Inc.*, 325 F. Supp. at 1062-1067.

A. The Half-Century-Old Decision in Federal Baseball Club, Long Moribund, Should Now Be Overruled.

In 1922, in a private antitrust suit brought by a professional baseball team which had sought to recruit players in competition with the then established major

[9] Petitioner has had no occasion to measure any of these alternatives against the antitrust laws, and he offers no opinion on them—except to observe that their adoption would ameliorate the harshness of Baseball's reserve system.

leagues, this Court held that it need not reach the validity under federal antitrust law of Organized Baseball's reserve system as it then existed because "exhibitions of baseball" were "purely state affairs," and were not interstate "trade or commerce" within the meaning of the Sherman Act. *Federal Baseball Club* v. *National League,* 259 U.S. 200, 208-209 (1922). Mr. Justice Holmes, writing for the Court, made no analysis of the reserve clause or of the antitrust laws, but simply relied upon then current doctrine which declared "personal efforts, not related to production" not to be "a subject of commerce," and which disregarded "interstate" aspects of multistate business when they related only to "transportation."

Although the unfortunate consequences of that short three-page opinion are still with us, its precedential underpinnings have long since disappeared. Indeed, in the very next term, the Court refused to apply *Federal Baseball Club,* reversing a lower court decision applying it to the theatrical business. *Hart* v. *B. F. Keith Vaudeville Exchange,* 262 U.S. 271 (1923) (Holmes, J.). Within a few years, this Court discarded the several concepts relied upon in 1922. *Hooper* v. *California,* 155 U.S. 648 (1895), which Holmes had cited, and its narrow view of "trade or commerce," did not survive *Mandeville Island Farms* v. *Crystal Sugar Co.,* 334 U.S. 219 (1948), and *United States* v. *South-Eastern Underwriters Ass'n,* 322 U.S. 533 (1944). And the doctrine, regarded as controlling in 1922, that personal services are not "trade or commerce" within the meaning of the Act, was conclusively rejected in *American Medical Assoc.* v. *United States,* 317 U.S. 519 (1943).

Indeed, this Court has already remarked the precedential demise of *Federal Baseball Club.* The opinion

for the Court in *Radovich* v. *National Football League,* 352 U.S. 445, 450 (1957), not only declined to apply *Federal Baseball Club* to a nearly identical arrangement in professional football, but expressly noted that it "at best was of dubious validity." In *United States* v. *Shubert,* 348 U.S. 222, 226-228 (1955) and in *United States* v. *International Boxing Club,* 348 U.S. 236, 240-241 (1955), this Court recounted the broadening of the interpretation of the Sherman Act's phrase, "trade or commerce," since 1922. It noted Holmes' rethinking as reflected in *Hart* v. *B. F. Keith Vaudeville Exchange,* supra. 348 U.S. at 228-229. And it refused to apply *Federal Baseball Club's* interpretation of the Sherman Act's "trade or commerce" language to boxing or the theatre.

Judge Friendly spoke the universal consensus when he wrote that

> "We freely acknowledge our belief that *Federal Baseball* was not one of Mr. Justice Holmes' happiest days, that the rationale of *Toolson* is extremely dubious and that, to use the Supreme Court's own adjectives, the distinction between baseball and other professional sports is 'unrealistic,' 'inconsistent' and 'illogical'. . . ."

Salerno v. *American League,* 429 F.2d 1003, 1005 (2d Cir. 1970) cert. denied, sub nom. *Salerno* v. *Kuhn,* 400 U.S. 1001 (1971).

In these circumstances, no genuine issue of *stare decisis* would be raised by a frank declaration that *Federal Baseball Club* has long ceased to be an appropriate interpretation of the "trade or commerce" language of the Sherman Act. This Court has already said as much.

Where, as here, a decision "rested on a most dubious foundation when announced [and has] become an increasingly unjustifiable anomaly as the law over the years has left it behind," this Court has frankly and without qualm overruled it. *Moragne* v. *States Marine Lines,* 398 U.S. 375, 404 (1970) (Harlan, J.), overruling *The Harrisburg,* 119 U.S. 199 (1886). *Federal Baseball Club,* too, was "somewhat dubious even when rendered" and "is such an unjustifiable anomaly in the present [antitrust] law that it should no longer be followed." 398 U.S. at 378. Here, too, a "development of major significance has intervened"—"the wholesale abandonment of the rule in most of the areas where it once held sway. . . ." 398 U.S. at 388. And, as the opinions below indicate, its continued formal authority compels lower courts to decide cases in ways which they cannot justify in their opinions and which embarrass the entire judicial process. "Respect for the process of adjudication should be enhanced, not diminished . . ." by overruling this anomaly. 398 U.S. at 405.

B. Toolson Does Not Stand in the Way.

In 1953, the Court announced a one-paragraph, unsigned opinion in *Toolson* v. *New York Yankees,* 346 U.S., 356 (1953), declining to overrule *Federal Baseball Club.* That decision does not preclude this Court, nearly two decades later, from now doing so. *Toolson,* after all, expressly omitted any "re-examination of the underlying issues." 346 U.S. at 357. Contrary to this Court's present jurisprudence, it attached great weight to congressional inaction in the face of the 1922 decision. Without a factual record, it conjectured that investors may have "relied" on Baseball's post-1922 immunity from the Sherman Act. And its conclusion

that complainants must seek their federal remedy in the Congress, where relief might be "prospective" and not from this Court, rested on the no longer valid assumption that a judicial remedy under the antitrust laws could only be "retrospective." *Ibid.*

Subsequent events have totally undermined *Toolson's* continued vitality, rendering it as pregnable as *Federal Baseball Club* itself.

1. Antitrust and Other Professional Sports.

Decisions relating to other professional sports have intervened since *Toolson* to discredit it just as *Federal Baseball Club* was discredited by later decisions repudiating its narrow view of the Sherman Act's jurisdictional language. Four years after *Toolson* was decided, this Court held the antitrust laws applicable to other professional sports and their arrangements for eliminating competition in the recruitment and retention of personnel. *Radovich* v. *National Football League,* supra. See also *United States* v. *International Boxing Club,* supra. The lower courts have followed the lead, applying the federal antitrust laws to invalidate arrangements whereby team owners restrict one another in competing for new players. *Denver Rockets* v. *All-Pro Management, Inc.,* supra. In dealing with other sports and similar enterprises, this Court has expressly recognized that there is no logical distinction between them and Baseball. *Radovich* v. *National Football League,* 352 U.S. at 452. The continued survival of such an anomaly embarrasses the judicial process.

2. Changes in Baseball Since 1953.

Whatever justification there was for regarding Baseball as a "sport" deeply rooted in the loyalties of particular groups of fans ceased to exist after 1953. The major leagues have grown from sixteen to twenty-four teams, (R. 689.) [A. 248] expanding to every city which seems able to pay the freight, and abandoning communities with long baseball histories. When Baseball's market forecast proves erroneous or is rendered irrelevant—as in Washington—by underfinancing of the venture, overpricing of tickets, or other economic considerations, the offending team is moved—by agreement of all the league's team owners—from one community to another. Thus Brooklyn and Washington vanish from Baseball, while Anaheim, California, and Arlington, Texas, obtain franchises.

There have been other, perhaps more important, changes. The reserve system itself has been made drastically more restrictive since it was before the Court in 1953. It was possible in 1953, as in 1922, for a talented young man to select his first employer from among those teams interested in bidding for his services; it was only after the signing of his first contract that he became enmeshed in the reserve system. But in 1965 this one remaining player freedom was eradicated. The institution of the semi-annual draft meant that a drafted player could negotiate only with the team which drafted him. All other teams are forbidden—by threat of boycott—from approaching him. *Toolson* declined to reconsider the validity of the old reserve system. But this Court has never been called upon to make that decision with respect to the present reserve system, with its involuntary draft of players. By its own hand, Baseball has substantially diminished whatever precedential value *Toolson* had.

3. The Alleged "Reliance" Interest.

Developments both doctrinal and otherwise have also put to rest the so-called "reliance interest" which the Court stressed in 1953.

First, what is the nature of the "reliance interest" here asserted? Upon what have Baseball investors actually "relied" since 1953? Or since 1922? *Federal Baseball Club* did not entitle any businessman to assume that, because his business involved personal services unrelated to production, he need not worry, even a half-century later, about engaging in anti-competitive practices. The likelihood of judicial or legislative correction became apparent as early as the next Term. And in fact this Court has not hesitated to apply the antitrust laws with full force to businessmen—including owners of professional sports teams—who had as much reason as baseball team owners to "rely" on *Federal Baseball Club* and *Toolson*.

Toolson itself gave little in the way of additional assurance. All that it said was that the Court would not then, in 1953, reconsider *Federal Baseball Club*. Moreover, it expressly invited legislative correction. Anyone interested in investing in a baseball team has known since *Toolson* that Congress might at any time enact legislation which would substantially change the relationship between Baseball and the antitrust laws. Indeed, post-*Toolson* purchasers of baseball teams testified below that they were advised change might come from Congress, but found assurance in the fact that change would not be "retroactive" and they would get a chance to state their case—benefits fully available in this very proceeding. (R. 1241-1244, 1313, 1360) [A.

292-94, 302, 304] [10] The investor knew also that the prospects for passage of such legislation fluctuate in response to external events. Thus when the owners consented to allow a large corporation controlling one of the three national broadcasting networks, to purchase the New York Yankees, it was widely believed by baseball men that this would jeopardize their industry's status under the antitrust laws.[11] Recent franchise shifts have occasioned similar fears, as must institution of the involuntary draft. All an investor has been able to "rely" upon is his estimate of the ability of Baseball effectively to *lobby* in Congress so as to prevent unduly adverse legislation. Is this the stuff of which a "reliance interest" is made? Wishful thinking about lobbying skill, however well-advised, is simply not "reliance" in a jurisprudential sense. It is opportunism.

We do not dispute that there are situations in which citizens are entitled to organize their affairs in "reliance" upon judicial decisions. Compare *City of Phoenix* v. *Kolodziejski,* 399 U.S. 204 (1970) (deny "full retroactive effect" to protect issuers of bonds who relied on prior law governing voting in bond elections). But there is no precedent in this Court for permitting businessmen to rely, for generations, upon palpably erroneous interpretations of the Sherman Act at the expense of the public policy in favor of competition, and to the cost of individual human beings made vic-

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[10] One new investor testified that before purchasing the Kansas City franchise, he was advised by his attorney that "there was always the possibility of changes in the player situation due to the Players Association." (R. 1452) [A. 325]

[11] See Paul Porter's October 7, 1964 letter to the Baseball Commissioner recounting these fears, set out in Hearings Before Sen. Subcomm. on Antitrust and Monopoly, on S. 950, 89th Cong., 1st Sess. (1965) pp. 156-161.

tims of anti-competitive practices not permitted to other businessmen. Economic interests vastly larger than Baseball "relied," for example, upon the famous decision of this Court in *United States* v. *E. C. Knight Co.*, 156 U.S. 1, 12 (1895), that manufacturing within a single state was not "commerce" within the meaning of the Sherman Act — that "commerce succeeds to manufacture and is not a part of it." But that did not prevent this Court from totally discarding *E. C. Knight,* a process well described by Mr. Justice Jackson in *Wickard* v. *Filburn,* 317 U.S. 111, 119-129 (1942). Moreover, it is now clear, if it was not then, that "reliance" by economic interests upon prior doctrine obviously vulnerable to judicial or legislative correction provides little protection. In *Lear, Inc.* v. *Adkins,* 395 U.S. 653, 674 n. 19 (1969), the Court explicitly overruled prior doctrine—patent licensee estoppel. It forthrightly rejected arguments based on a "reliance interest," finding that justifiable reliance had been diminished by the perceptible erosion of the doctrine of licensee estoppel, that it was not convinced that real harm would in fact follow, and that the "public's interest" had to be weighed in the balance. The same result is required here.

Next, the allegation, never proven and largely irrelevant, that investments in Baseball would be imperiled if the reserve system is subjected to antitrust scrutiny is repudiated by developments in other sports. While Baseball mainains the general posture that only the reserve system in its present form enables a professional team sport to survive,[12] the record in other

[12] Although several of Respondents' witnesses, including Kuhn himself, did testify that change was inevitable and that the effect upon Baseball would depend upon the nature of the change. (R. 806) [A. 273]

organized professional team sports is to the contrary, for no other professional sport has found it necessary, or even desirable, to restrict player and team owner freedom as severely as Baseball.

Professional football, for example, permits its players to play one year without a contract, after which they cease to be members of a team and are free to negotiate with any other team owner,[13] the Commissioner being empowered to require the new employer to compensate the former employer where they cannot themselves agree. (R. 463, 466-68) [A. 213, 215-16] Players are also permitted to negotiate contracts which require their consent to a trade. (R. 469-470) [A. 217] And the Canadian League competes with the two American Leagues for players. (R. 474) [A. 218] More importantly, National Basketball Association owners have formally stated to Congress that they intend to virtually eliminate the reserve system from their sport. They have agreed, in a letter appended hereto as Appendix B, to allow rookie players to be tied to their initial employer for just one year following their original contract, while veteran players are to be free at the termination of each contract to negotiate with other employers. The NBA does propose certain restrictions which may or may not prove acceptable to the players, or permissible under the antitrust laws. The principal one is a provision that an "independ-

[13] The Commissioner of Professional Football testified at trial that ten players "played out their option" in 1969 (R. 463) [A. 213], and that players who had done so had signed with new teams (R. 468-469) [A. 216] The Commissioner of the National Basketball Association testified that he has approved contracts forbidding assignment without the player's consent (R. 521) [A. 223], and that his league's players sometimes "jump" to the competing American Basketball Association. (R. 523) [A. 224]

ent" panel of three representing both owners and players may fix the compensation due a player's former team from the team which signs him. Whatever the fate of this proposal, and we have no occasion to pass judgment upon it, it certainly demonstrates that basketball investors don't share the fears professed by Baseball. Indeed, one leading basketball magnate, Samuel Schulman of the Seattle Supersonics, was quoted in the press in February of 1971 as saying the following:

> "It is my feeling that sports would be better off with no reserve clauses. There is no reason why athletes should be chattels of the owners. Every performer should be free to negotiate for himself as people do in other businesses. If a guy in any sport doesn't want to play for Seattle or Los Angeles or Buffalo, or any other team, why should he be made to do so because the owners have decided that reserve clauses are good for the game? If all reserve clauses were thrown out, you would find after a while that everything would level off and no significant changes would be made."

When asked what would happen to an owner if richer ones decided to gather up all the talent, Schulman is quoted as replying,

> "He would be left with a choice. He would compete the best way he could or get out of sports. In other businesses of mine, I sign people to contracts of maybe one to five years. At the end of that time, they are free to stay, or move elsewhere. And life goes on. It would be no different in sports." [14]

[14] Mr. Schulman's statements are contained in a formal statement submitted to the Senate Antitrust Subcommittee inquiring into the proposed merger of the two professional basketball leagues. See Statement of Lawrence Fleisher for National Basketball Players Ass'n, before Sen. Subcomm. on Antitrust and Monopoly, on S. 2373, 92d Cong., 1st Sess. (Nov. 1971) p. 26.

It is significant that two post-*Toolson* investors in Baseball testified at trial that they simultaneously invested in local football teams—in Cincinnati and Los Angeles—despite their awareness that football *was* subject to the federal antitrust laws and had a reserve system much more permissive than Baseball's. (R. 1258, 1370) [A. 295, 305] So much for "reliance" on *Toolson*.

4. Congressional Inaction Since Toolson

Toolson emphasized the fact that Congress had not legislatively reversed *Federal Baseball Club*. A probable explanation is that decisions by this Court quickly stripped *Federal Baseball Club* of precedential force, removing the impetus for legislative tinkering with the Sherman Act. It is now clear, however, that the 1953 *per curiam* decision erred in attempting to read meaning into the mere failure of Congress to act. Recent decisions have reinvigorated the salutary rule that courts should not regard congressional inaction after controversial judicial decision as legislative ratification of that decision. See *Blonder-Tongue Labs.* v. *University Foundation,* 402 U.S. 313, 327 n. 17, and 342 n. 37 (1971) (bills to reverse a prior decision had died in committee); *Boys Markets* v. *Clerk's Union,* 398 U.S. 235, 240-242 (1970); *Moragne* v. *States Marine Lines,* 398 U.S. at 393, 405 n. 17; *FTC* v. *Dean Foods Co.,* 384 U.S. 597, 609 (1966); *Helvering* v. *Hallock,* 309 U.S. 106, 120 (1940).

As the Court said in *Girouard* v. *United States,* 328 U.S. 61, 69 (1946), and reiterated in *Boys Markets,* supra, at 241: "It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law."

Were the Court to reject this long line of cases and attempt to read meaning into the legislative record here, the result would not now lead to the *Toolson* result. As of 1965 Congress had declined to enact any one of sixty or more legislative proposals relating to the status under the antitrust laws of professional team sports. Most supported or proposed a more secure legal foundation for Baseball's reserve system than that furnished by *Federal Baseball Club* and *Toolson*. See Sen. Rep. No. 462, Sen. Comm. on Judiciary, 89th Cong., 1st Sess. (1965) pp. 8-12. All that can fairly be said is that there has been a stalemate. Neither proponents nor opponents have prevailed—hardly surprising in light of the relatively greater ease with which legislation can be averted rather than enacted. The only relevant legislation actually written into law in this period was the statute which explicitly exempted "football, baseball, basketball [and] hockey" from the federal antitrust laws for the narrowly limited purpose of negotiating collectively for national television revenues. 15 U.S.C. § 1291, 80 Stat. 1515 (1966). If this one enactment means anything, it is that Congress put Baseball in precisely the same category as professional football, basketball, and hockey, sports concededly under the Sherman Act, and concluded that Baseball, like these other professional team sports, needed a statutory exemption before its team owners could safely take concerted action of an anti-competitive character.

5. Prospective Judicial Relief.

To the extent that *Toolson* rested upon the alleged ability of Congress to provide a "prospective" remedy and upon the disability of the courts to act other than "retroactively," its foundation has proven wholly illu-

sory. In *Simpson* v. *Union Oil Co.*, 377 U.S. 13, 24-25 (1964), and 396 U.S. 13, 14 (1969), this Court indicated that in an appropriate case, particularly where a newly announced rule is "innovative" and persons may have justifiably relied on prior rulings, a federal court may fashion partially prospective relief when plaintiff establishes a cause of action. In *United States* v. *Estate of Donnelly*, 397 U.S. 286, 295 (1970), this Court reiterated this doctrine. It held that "in rare cases, decisions construing federal statutes might be denied full retroactive effect, as *for instance where this Court overrides its own construction of a statute. . . .*" (emphasis supplied) Justices Douglas, Brennan and Stewart indicated they would, in that very case, protect parties against fully "retroactive" application even of a decision overturning a dubious lower court precedent. 397 U.S. at 297-300. Mr. Justice Harlan elaborated on the circumstances in which he would deny full retroactive relief. 397 U.S. at 295-297. Not one member of the Court took the position that relief must always be fully retroactive. And in recent cases involving justifiable reliance by local governments and others who issued or purchased bonds under ground rules later found invalid, this Court has actually granted prospective relief. *Cipriano* v. *Houma*, 395 U.S. 701, 706, (1969) ("Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."); *City of Phoenix* v. *Kolodziejski*, supra. *Toolson*, accordingly, rests on an exceedingly weak reed.

The present situation almost precisely parallels *Boys Markets* v. *Clerks Union*, 398 U.S. 235 (1970). There,

the Court reconsidered its prior decisions in *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962), where it had interpreted a hotly contested provision of the Norris-LaGuardia Act, and had expressly invited legislative reconsideration. Congress was called upon to respond to the invitation, but did not enact into law the proposed legislation. In *Boys Market*, this Court declined to read any meaning into this inaction; instead, it reconsidered its earlier decision on the merits and overruled *Sinclair*.

Here, where it must be conceded that the precedential underpinnings of *Federal Baseball Club* have long ago disappeared, where this Court has repeatedly construed the identical statutory provision in a way inconsistent with *Federal Baseball Club*, where baseball owners have for twenty years been disentitled to rely upon any immunity from state law interference with the reserve clause and have themselves invited federal legislative consideration of the subject, where developments in other professional sports have made palpably untenable Baseball's continued "immunity," and when the availability of partially prospective judicial relief has now become established, there is no justification for not taking up the problem deferred two decades ago.

II. THE COURT BELOW ERRED IN FAILING TO APPLY STATE ANTITRUST LAW TO ORGANIZED BASEBALL'S RESERVE SYSTEM.

Once the Court of Appeals determined it had to follow *Federal Baseball Club*, it ought to have done so across the board; it should have concluded—as Baseball had itself forcefully represented both in *Federal Baseball Club* and in *Toolson*—that state and local laws are applicable if federal law is not. See Brief for Re-

spondent in *Federal Baseball Club*, No. 204, 1921 Term, p. 67; Brief for Respondent New York Yankees in *Toolson*, No. 18, 1953 Term, p. 30. But when the court turned to petitioner's state law claims, it accepted respondents' new position that Baseball was indeed "interstate commerce." It then compounded the error by ruling, without the "particularized inquiry" mandated by an unbroken line of decisions of this Court, that Baseball's involvement in "interstate commerce" somehow insulated it from all state antitrust laws.

While granting that the various state antitrust provisions do not appear to impose conflicting duties, and conceding there was no congressional mandate to displace state law, the court held, without examining the law of any particular jurisdiction, that the states had insufficient interest in their antitrust laws to warrant imposing whatever this undefined burden was upon Baseball. It simply declared that

> "[W]e do not find that a state's interest in antitrust regulation, when compared with its interest in health and safety regulation, is of particular urgency. Hence, as the burden on interstate commerce outweighs the states' interests in regulating baseball's reserve system, the Commerce Clause precludes the application here of state antitrust law." 443 F.2d at 268. [A. 131]

The court was not able to cite any authority for the proposition that non-discriminatory state antitrust laws should be given an inferior place in the hierarchy of state values, or for the proposition that Baseball's self-interest was to be given more weight than the states' public interest in curbing group boycotts and blacklisting of professional baseball players.

There is no basis in the decisions of this Court under the Commerce Clause for this wholesale displacement

of state antitrust laws. What appears to have happened is that the court below scrambled two different rules—one requiring displacement of all state regulation when Congress has preempted the field, and another permitting only selective displacement of that state regulation which actually interferes with interstate commerce.

Huron Portland Cement Co. v. *Detroit*, 362 U.S. 440, 443 (1960), announced the two-part standard to be used in determining when non-discriminatory state regulation affecting interstate commerce is permissible. Mr. Justice Stewart wrote that:

> "Evenhanded local regulation to effectuate a legitimate local public interest is valid unless preempted by federal action . . . or unduly burdensome on maritime activities or interstate commerce."

The first of these two standards—that Congress has shown a requisite "clear and manifest purpose" to occupy the field—is surely not met here. And the court below did not suggest that it was.[15]

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[15] Judge Cooper did base preemption partly on legislative inaction after *Toolson*. 316 F.Supp. at 279. (R. 153A-154A) [A. 109-10] And two of the seven members of the state court in *Wisconsin* v. *Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N.W. 2d 1, cert. denied, 385 U.S. 990 (1966), took a similar position. But recent cases of this Court do not permit a conclusion of legislatively mandated preemption unless "Congress has unmistakenly so ordained." *Florida Avocado Growers* v. *Paul*, 373 U.S. 132, 142 (1963). It should be noted that three members of the Wisconsin court held that state law *should* apply. (Two others joined a four-man majority in favor of Baseball, but on another theory.) In any event, the Wisconsin case is easily distinguished from the present one, for it involved a species of local protectionism—keeping a local enterprise at home—always suspect under the Commerce Clause. See *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 145 (1970).

Nor is the second standard—undue burden on commerce—met here. In determining whether state regulation is unduly burdensome, this Court has always insisted upon what Mr. Justice Black termed "the importance of a particularized inquiry into the existence of a burden on commerce." *Colorado Comm'n v. Continental*, 372 U.S. 714, 720 (1963). It has never displaced even a single state's law without the most careful and scrupulous examination of the precise regulation involved, its purpose, and its impact upon the activity to be regulated. See, e.g., *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). Evenhanded state regulation is uniformly sustained except where there has been a showing (1) of actual irreconcilable conflict with applicable laws of another jurisdiction, *Bibb* v. *Navajo Freight Lines*, 359 U.S. 520 (1959) (displace Illinois mudguard law which imposes duty inconsistent with those imposed by sister states), and *Colorado Comm'n* v. *Continental*, supra, (sustain an antidiscrimination law where no conflict shown with valid law of another jurisdiction), or (2) of an intolerable—but clearly defined—imposition on industry or particular enterprise, *Pike* v. *Bruce Church, Inc.*, 397 U.S. at 144-146.

Here, there has been no showing either of conflict between applicable laws, or of unacceptable harm to Baseball. Indeed, the court below conceded that there appears to be uniformity among the applicable statutes, 443 F.2d at 267, and the trial judge concluded that Baseball could accommodate a much less onerous system of controlling its players. 316 F.Supp. at 284. (R. 171A) [A. 117-120]

Moreover, the only proper remedy where a state law is found too burdensome is to displace *that particular*

law. There is no precedent in the decisions of this Court for immunizing an entire industry from regulation by *any* state on the ground that *one* state might have a statute which cannot permissibly be applied to the industry. See, e.g., *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945), where the Court displaced one state's statute—but left the railroads subject to less stringent laws of all other states.

The court below predicted that Baseball will adjust to the "most stringent" regime laid down by any state in which it operates. 443 F.2d at 268. [A. 130] Absent federal occupation of the field—and the Court of Appeals found none—all the Commerce Clause does for an enterprise not subjected to conflicting duties is to protect it against "a most stringent" law which goes too far. It does not provide protection against those laws which do not offend.

The decision below also seriously misconceived the complementary relationship of state and federal antitrust regulation. Senator Sherman in 1890 expressly justified the bill which became the Sherman Act on the ground that its "single object" was to "*supplement* the enforcement of the established rules of common law and statute law by the courts of the several states." 21 Cong. Rec., 51 Cong., 1st Sess. (1890), 2457. (Emphasis supplied.) The House Report on the Sherman Act stated that federal legislation "will prove of little value unless the states shall *supplement* it by such auxiliary and proper legislation as may be within their legislative authority." H.R. 1707, 51st Cong., 1st Sess. (1890), 1. (Emphasis supplied.) State antitrust law has, in fact, developed in parallel or supplementary form, rather than in conflict with federal antitrust law. State courts and legislatures have so regarded

their antitrust laws as in harmony with the Sherman Act, even applying Sherman Act precedents to construe the state statutes. See, e.g., *Chicago Title Ins.* v. *Great Western Fin. Corp.*, 70 Cal. Rptr. 849, 69 Cal. 2d 305, 444 P. 2d 481 (1968); 38 Ill. Ann. Stat. § 60-11 (Smith-Hurd, 1970). And this Court has consistently sustained the application of state antitrust law to conduct subject to the Sherman Act. *Giboney* v. *Empire Storage Co.*, 336 U.S. 490 (1949); *Puerto Rico* v. *Shell Co.*, 302 U.S. 253 (1937); *Tigner* v. *Texas*, 310 U.S. 141 (1940). For all practical purposes, state antitrust law is nothing more than a grant of supplementary authority to local officials and state courts to enforce substantive provisions which are carbon copies of the first two sections of the Sherman Act, plus prohibitions against deceptive trade practices—precisely the kind of supplementary state regulation permitted by this Court in *Head* v. *Board of Examiners*, 374 U.S. 424, (1963). See especially Mr. Justice Brennan's concurring opinion, 374 U.S. at 441-446, on the relationship of the FCC and the FTC to state regulation.

Finally, the decision below unneccessarily diminishes state antitrust law—indeed paralyzes it. The rationale of the court jeopardizes, for example, developing state efforts to protect consumers against companies engaged in interstate commerce but not now adequately regulated by federal law. If Baseball's self-interest in avoiding state regulation is superior to the states' public interest in dealing with group boycotts and blacklists directed against their citizens, why is a door-to-door seller's similar self-interest not superior to a state's interest in giving its citizens three days to cancel each sale? Or in requiring disclosure of the ultimate finance charges? And what other legitimate

public interests are threatened with subordination to private interest on the theory espoused below? As one distinguished state court has observed.

> "If state laws have no force as soon as interstate commerce begins to be affected, a very large area will be fenced off in which the states will be practically helpless to protect their citizens without ... a corresponding contribution to the national welfare." *Commonwealth* v. *McHugh*, 326 Mass. 249, 265, 93 N.E. 2d 751, 762 (1950).

Controlling decisions of this Court require that greater respect be paid to state antitrust policy than did the court below. See, e.g., *International Harvester Co.* v. *Missouri*, 234 U.S. 199, 209 (1934); *German Alliance Ins. Co.* v. *Hale*, 219 U.S. 307, 316 (1911).

This Court has never authorized the wholesale displacement of state statutes which have not been shown to be discriminatory, or to conflict with one another or with federal law, or to threaten a genuine and carefully defined harm to an interstate activity, which harm outweighs the local public interest. It has never preempted the laws of every state on the ground that one such law—were it to be examined—might prove offensive. It should not do so now.

III. THE SO-CALLED "LABOR EXEMPTION" DOES NOT INSULATE THE RESERVE SYSTEM FROM ANTITRUST SCRUTINY.

For half a century, Organized Baseball has succeeded in persuading one forum after another that "some other forum" is the appropriate one to deal with the abuses of the reserve clause. In its brief to this Court in 1922, Organized Baseball argued that

baseball should be exempted from federal antitrust regulation because

> "a state is entirely competent to reach and deal with any evil in the field of sport requiring legislative remedy."

Resp. Br., No. 204, 1921 Term, p. 67. It then told Congress that the federal courts were available. In the words of the Celler Subcommittee's 1952 report, Baseball

> "represented by eminent counsel, has assured the subcommittee that the legality of the reserve clause will be tested [in the courts] by the [Sherman Act's] rule of reason." H.R. Rep. 2002, 82d Cong., 2d Sess. (1952), 231.

Then, in 1953, Baseball successfully—if opportunistically—argued to this Court in *Toolson* that it ought not to subject the reserve system to the Sherman Act's "rule of reason" because Baseball was sufficiently regulated by state law. Respondent New York Yankees told this Court that a baseball game in Los Angeles is only

> "a local affair subject to the regulatory powers of the State of California and the City of Los Angeles."

Br. p. 30. But in 1966, Baseball argued to the Wisconsin state court that only *federal* law could regulate baseball adequately. *Wisconsin* v. *Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N.W. 2d 1, cert. denied, 385 U.S. 990 (1966). Then, in 1969, Baseball insisted in the National Labor Relations Board that any labor dispute in the sport would *not* substantially affect interstate commerce and, in any event, baseball was

now international in its operations: *American League & Ass'n of Umpires*, 180 N.L.R.B. No. 30, Case 1-RC-10414 (Dec. 15, 1969).

Now, having largely abandoned the argument in the Court of Appeals, Baseball suggests that this case is only a labor dispute over a mandatory collective bargaining issue, and is therefore somehow exempt from antitrust scrutiny. The suggestion is a shallow one.

Respondents are not labor organizations with a claim to exemption. They are businessmen, taking concerted action on a worldwide scale to eliminate competition in procurement of the key "commodity" in their industry—playing talent. And petitioner does not seek judicial redress for a labor dispute between himself and his employer. Rather, he charges that he has been damaged by respondents' industry-wide agreement to eliminate competition and by their boycotts.

Section 4 of the Norris-LaGuardia Act and Sections 6 and 20 of the Clayton Act do exempt certain activities of labor organizations, when acting alone, from the antitrust laws, for otherwise their routine functioning would not be possible. *United States* v. *Hutcheson*, 312 U.S. 219 (1941). But when, as in *Ramsey* v. *Mine Workers*, 401 U.S. 302 (1971), or *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965), or *Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965), it is labor organizations—not businessmen—which are charged with antitrust violation, it becomes necessary to harmonize the policies of the antitrust and labor relations statutes.

In these cases, this Court concluded that when a labor organization acts "unilaterally" and in its members' interests—not by agreement with non-labor groups—

and on a matter of "immediate and direct" union concern, it is indeed insulated from the antitrust laws. But when even a labor organization, the express beneficiary of the statutory exemption, combines with a group of employers to eliminate competition by other employers, or to impose wage standards on other employers, the labor organization is liable for damages under the antitrust laws—this despite the fact that its members are the intended beneficiaries, and that the subject of agreement is wages or hours. *Ramsey* v. *Mine Workers*, 401 U.S. at 313. As the Court wrote in *Pennington*, the fact that parties must bargain "does not mean that the agreement reached may disregard other laws." 381 U.S. at 665. No Justice participating in any of these three recent decisions suggested that a labor organization would avoid antitrust liability if it participated in a hard-cord "anticompetitive commercial restraint" such as "pricefixing and market allocation"—or we might add, group boycotts. *Meat Cutters* v. *Jewel Tea*, 381 U.S. at 732-33 (concurring opinion).

The present case is an *a fortiori* one. Respondents here are not a labor organization, but businessmen who have agreed among themselves to eliminate competition in the most important phase of their enterprise. Their reserve system and the group boycott used to enforce it are not part of any collective bargaining agreement with the only labor organization in the industry, the small, 600-man Major League Baseball Players Association. Crucial parts of the arrangement to eliminate competition in the recruitment and retention of personnel appear only in rules promulgated by the employers themselves, and in whose promulgation the players play no part. Moreover, the reserve system and the group boycott used to enforce it affect not only the 600 members of the Major League Baseball Players

Association, but also countless numbers of unorganized players in the twenty-one minor leagues in the United States, Mexico and Canada, none of whom participates in collective bargaining. They also restrict the competitive freedom of minor league and team owners in countries as far away as Japan, with whom the Players Association has no relationship and who have agreed not to negotiate with petitioner and those similarly situated.

No decision of this Court immunizes such an anti-competitive agreement among businessmen, or the plainly unlawful technique they utilize to enforce it, from scrutiny under the federal antitrust laws. Indeed, it is well established that anti-competitive arrangements among businessmen do not escape the antitrust laws where they also implicate employee groups or purport to confer benefits upon them. In Mr. Justice Jackson's pungent phrase,

> "Benefits to organized labor cannot be utilized as a cat's paw to pull employers' chestnuts out of the antitrust fires."

United States v. *Womens Sportswear Mfr's Ass'n*, 336 U.S. 460, 464 (1949). See also *Allen Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797 (1945). An identical argument, that the reserve system and boycott generate a labor dispute resolvable only at the bargaining table or before the NLRB, was advanced by professional football in *Radovich*, and rejected by this Court as "without merit."

The result could not be otherwise. The broad contention that an employee's dispute with his employer over the terms and conditions of employment should be taken up through the collective bargaining process is hardly applicable to the present case. An engineer

employed by IBM and dissatisfied with the terms of employment, who is unable to achieve satisfaction through the collective bargaining process, is always free to seek employment with one of IBM's competitors, or with a company in an unrelated industry which has need of his engineering talent. But a baseball player has no such alternative, for every potential employer of his services in the United States and abroad has agreed in advance to refuse to deal with him. This agreement among businessmen violates the antitrust laws. It need no more be taken up in the collective bargaining process than would an agreement among employers to pay less than the minimum wage, or to discriminate in hiring on the basis of race.

There is considerable irony in the suggestion from Baseball that this litigation should be dismissed and the issues referred to the bargaining table so that the national policy of minimizing labor strife may thereby be vindicated. Does it really advance industrial peace to dismiss a two-year old litigation after a full trial in order to compel baseball players, whose average major league career is less than five years long, to strike to eliminate a system they have persistently deemed to be unlawful? (R. 1904-1905) [A. 376] And strike there would have to be. Baseball has demonstrated its adamant refusal to make even the slightest concession to the Players Association with respect to the reserve system. (R. 179, 281, 1889) [A. 167, 193, 367] It has even declined to agree to release players from its restrictions when they reach the advanced age of 65 — on the theory that this would "open the door" to greater liberalization. (R. 1893-95) [A. 369-71] And what good would a strike by the Players Association do for the thousands of minor league players who are not organized, or for marginal major league players

who may be forced to seek employment in the minor leagues, in Latin America, or in Japan?

The answer to anti-competitive practices by businessmen lies, not in labor strife, but in the antitrust laws.

CONCLUSION

Baseball's own economic expert witness, John Clark, testified at trial that the compensation paid to players has been a declining percentage of the industry's expenses.[16] He testified that front office expense has increased three times faster than have players' salaries—and that this did not indicate the players had a strong position. (R. 1818) [A. 359] He testified that the reserve system has not worked at "a satisfactory level" over the years to achieve what respondents claim is a principal objective—"a reasonable level of competition on the field"—for four teams have won 63% of the league championships in the last half century. (R. 1858) [A. 362-63] And baseball-team owners repeatedly testified that other professional team sports, using less restrictive devices to maintain player continuity, have not experienced the problems which Baseball contends would result if it were to follow their lead and ameliorate the reserve system. (R. 1258, 1405-1406) [A. 295, 312-13]

But as telling as such testimony was, it is largely beside the point. Neither federal nor state law permits

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[16] The record shows that players' salaries were 35.3% of major league team expenses in 1929, 28.9% in 1943, 24.8% in 1946, 22.1% in 1950, and 19-20% in 1970. (R. 1780-81) [A. 486] The average major leaguer earns only $44,090 over his full five-year career. (R. 1801-1802) [A. 355] Fully 109 of the 600 major league players in 1969 were paid the minimum salary permitted. (R. 1831) The median player salary increased only 17.7% between 1965 and 1969. (R. 1837) [A. 360]

businessmen to enter into worldwide agreements to eliminate competition in the procurement of essential commodities, or to enforce such agreements by group boycotts, whatever the purported economic justification. Petitioner has been the victim of these *per se* violations of law, and seeks redress. Although his right to that redress has not been rested in this Court on the national policies against slavery and peonage cited below, these policies do add urgency to his suit. For it is not right for this country to tolerate in any area of its national life, and perhaps particularly in what professes to be its national sport, arrangements which deny human beings the dignity and freedom guaranteed all Americans by Constitution, statute, and our ideals. The time has come to bring the national sport into the national mainstream.

Respectfully submitted,

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APPENDIX A

Constitutional and Statutory Materials

U.S. Const., Art. I, Sec. 8:

"The Congress shall have power . . . to regulate Commerce with Foreign Nations, and among the several States, and with Indian Tribes. . . ."

U.S. Const., Amend. XIII:

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"Section 2. Congress shall have power to enforce this article by appropriate legislation."

Section 1 of the Sherman Act, 15 U.S.C. § 1:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

Section 1581 of 18 U.S.C.:

"(a) Whoever holds or returns any person to a condition of peonage, or arrests any person with the intent of placing him in or returning him to a condition of peonage, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

"(b) Whoever obstructs, or attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be liable to the penalties prescribed in subsection (a)."

Section 1994 of 42 U.S.C.:

"The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of any Territory or State, which have heretofore established, maintained or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void."

Section 102 of 29 U.S.C.:

"In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bar-

gaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted."

Section 103 of 29 U.S.C.:

"Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 102 of this title, is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

"Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby.

"(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

"(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization. Mar. 23, 1932, c. 90, § 3, 47 Stat. 70."

Illustrative State Statutes

CALIFORNIA

Business and Professions Code

Sec. 16720. A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: (a) To create or carry out restrictions in trade or commerce. [Calif. Bus. & Prof. Code § 16720 (West 1964)]

* * * * *

Sec. 16726. Except as provided in this chapter, every trust is unlawful, against public policy and void. [Calif. Bus. & Prof. Code § 16726 (West 1964)]

* * * * *

Sec. 16600. Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void. [Calif. Bus. & Prof. Code § 16600 (West 1964)]

THE DISTRICT OF COLUMBIA

Sherman Act

Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. [15 U.S.C. § 3 (1963)]

GEORGIA

Constitution

Article IV, Section IV. All contracts and agreements, which may have the effect, or be intended to have the effect, to defeat or lessen competition, or to encourage monopoly, shall be illegal and void. The General Assembly of this State shall have no power to authorize any such contract or agreement. [2 Ga. Stat. Ann. § 2701 (1948)]

Code

Section 20-504. A contract which is against the policy of the law cannot be enforced; such are contracts tending to corrupt legislation or the judiciary, contracts in general restraint of trade, contracts to evade or oppose the revenue laws of another country, wagering contracts, contracts of maintenance or champerty. [20 Ga. Code Ann. § 504 (1965)]

ILLINOIS

Antitrust Act of 1965

Sec. 3. Every person shall be deemed to have committed a violation of this Act who shall:

(1) Make any contract with, or engage in any combination or conspiracy with, any other person who is, or but for a prior agreement would be, a competitor of such person:

a. for the purpose or with the effect of fixing, controlling, or maintaining the price or rate charged for any commodity sold or bought by the parties thereto, or the fee charged or paid for any service performed or received by the parties thereto;

b. fixing, controlling, maintaining, limiting, or discontinuing the production, manufacture, mining, sale or supply of any commodity, or the sale or supply of any service, for the purpose or with the effect stated in paragraph a. of subsection (1);

c. allocating or dividing customers, territories, supplies, sales, or markets, functional or geographical, for any commodity or service; or

(2) By contract, combination, or conspiracy with one or more other persons unreasonably restrain trade or commerce. [38 Ill. Ann. Stat. § 60-3 (Smith-Hurd 1970)]

* * * * *

Sec. 11. When the language of this Act is the same or similar to the language of a Federal Anti-trust Law, the courts of this state in construing this Act shall follow the construction given to the Federal Law by the Federal Courts. [38 Ill. Ann. Stat. § 60-11 (Smith-Hurd 1970)]

KANSAS

Statutes

Section 50-101. A trust is a combination of capital, skill, or acts, by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either, any or all of the following purposes:

First. To create or carry out restrictions in trade or commerce, or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state [50 Kan. Stat. Ann. § 101 (1964)]

* * * * *

Sec. 50-102. All persons, companies, or corporations within this state are hereby denied the right to form or to be in any manner interested, either directly or indirectly, as principal, agent, representative, consignee or otherwise, in any trust as defined in section one [50-101] of this act. [50 Kan. Stat. Ann. § 102 (1964)]

Sec. 50-107. Any contract or agreement in violation of any of the provisions of this act shall be absolutely void and not enforceable in any of the courts of this state; and when any civil action shall be commenced in any court of this state it shall be lawful to plead in the defense thereof

that the plaintiff or any other person interested in the prosecution of the case is at the time or has within one year next preceding the date of the commencement of any such action been guilty; either as principal, agent, representative, or consignee, directly or indirectly, of a violation of any of the provisions of this act, or that the cause of action grows out of any business transaction in violation of this act. [50 Kan. Stat. Ann. § 107 (1964)]

MARYLAND

Constitution: Declaration of Rights

Art. 41. That monopolies are odious, contrary to the spirit of a free government and the principles of commerce, and ought not to be suffered.

MASSACHUSETTS

General Laws

Every contract, agreement, arrangement, combination or practice in violation of the common law whereby a monopoly in the manufacture, production, transportation or sale in the commonwealth of any article or commodity in common use is or may be created, established or maintained, or whereby competition in the commonwealth in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within the commonwealth of the manufacture, production, transportation or sale of any such article or commodity, the free pursuit in the commonwealth of any lawful business, trade or occupation is or may be restrained or prevented; or whereby the price of any article or commodity in common use is or may be unduly enhanced within the commonwealth, is hereby declared to be against public policy, illegal and void. [93 Mass. Gen. Laws Ann. § 2 (1958)].

No person shall, by intimidation or force, prevent or seek to prevent a person from entering into or continuing the employment of any person. [149 Mass. Gen. Laws Ann. § 19 (1958)]

MICHIGAN

Compiled Laws

Section 445.761. Section 1. All agreements and contracts by which any person, co-partnership or corporation promises or agrees not to engage in any avocation, employment, pursuit, trade, profession or business, whether reasonable or unreasonable, partial or general, limited or unlimited, are hereby declared to be against public policy and illegal and void. [Mich. Comp. Laws Ann. § 445.761 (1967)]

Section 445.762. Section 2. All combinations of persons, copartnerships, or corporations made and entered into for the purpose and with the intent of establishing and maintaining or of attempting to establish and maintain a monopoly of any trade, pursuit, avocation, profession or business, are hereby declared to be against public policy and illegal and void. [Mich. Comp. Laws Ann. § 445.762 (1967)]

MINNESOTA

Antitrust Act of 1971

Section 3. A contract, combination, or conspiracy between two or more persons in unreasonable restraint of trade or commerce is unlawful. . . . [Minn. Stat. Ann. § 325.8014 (added by Session Laws of 1971, Ch. 865).]

Section 5. Without limiting section 3 of this act, the following shall be deemed to restrain trade or commerce unreasonably and are unlawful:

(1) A contract, combination, or conspiracy between two or more persons in competition:

(a) for the purpose or with the effect of affecting, fixing, controlling or maintaining the market price, rate, or fee of any commodity or service;

(b) affecting, fixing, controlling, maintaining, limiting, or discontinuing the production, manufacture, mining, sale or supply of any commodity, or the sale or supply of any service, for the purpose or with the effect of affecting, fixing,

controlling, or maintaining, the market price, rate, or fee of the commodity or service; or

(c) allocating or dividing customers or markets, functional or geographical, for any commodity or service.

* * * * *

(3) A contract, combination, or conspiracy between two or more persons refusing to deal with another person, except a refusal to deal by associations, trading boards, or exchanges when predicated upon a failure to comply with rules of membership. [Minn. Stat. Ann. § 325.8015 (added by Session Laws of 1971, Ch. 865).]

MISSOURI

Statutes

Section 416.010. Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation or understanding with any person or persons in restraint of trade or competition in the importation, transportation, manufacture, purchase or sale of any product or commodity in this state, or any article or thing bought or sold whatsoever, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and shall be punished as provided in sections 416.010 to 416.100, 416.240, 416.260 to 416.290 and 416.400. [Mo. Ann. Stat. § 416.010 (1952).]

Section 416.030. Any two or more persons engaged in buying or selling any article of commerce, manufacture, mechanism, commodity, convenience, repair, any product of mining, or any article or thing of any class or kind whatsoever, who shall create, enter into, become members of or participate in any pool, trust, agreement, combination, confederation, association or understanding to control or limit the trade in any such article or thing, or to limit competition in such trade by refusing to buy from or sell to any other person any such article or thing aforesaid, for the reason that such other person is not a member of or a party

to such pool, trust, combination, confederation, association or understanding, or shall boycott or threaten any person from buying or selling to any other person who is not a member of or a party to such pool, trust, agreement, combination, confederation, association or understanding in such article or thing aforesaid, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and punished as provided for in sections 416.010 to 416.100, 416.240, 416.260 to 416.290 and 416.400. [Mo. Ann. Stat. § 416.030 (1952).]

Section 416.040. All arrangements, contract, agreements, combinations or understandings made or entered into between any two or more persons, designed or made with a view to lessen, or which tend to lessen, lawful trade, or full and free competition in the importation, transportation, manufacture or sale in this state of any product, commodity or article, or thing bought and sold, of any class or kind whatsoever . . . are hereby declared to be against public policy, unlawful and void; and any person or persons creating, entering into, becoming a member of or participating in such arrangements, contracts, agreements, combinations or understandings shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and punished as provided for in section 416.010 to 416.100, 416.240, 416.260 to 416.290 and 416.400. [Mo. Ann. Stat. § 416.040 (1952).]

NEW YORK

Consolidated Laws

Section 340. 1. Every contract, agreement, arrangement or combination whereby

A monopoly in the conduct of any business, trade or commerce or in the furnishing of any service in this state, is or may be established or maintained, or whereby

Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the fur-

nishing of any service in this state is or may be restrained or whereby

For the purpose of establishing or maintaining any such monopoly or unlawfully interfering with the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state any business, trade or commerce or the furnishing of any service is or may be restrained, is hereby declared to be against public policy, illegal and void. [N.Y. Gen. Bus. Laws § 340 (McKinney, 1968).]

OHIO

Code

Section 1331.01. As used in sections 1331.01 to 1331.14, inclusive, of the Revised Code:

(B) "Trust" is a combination of capital, skill, or acts by two or more persons for any of the following purposes: (1) To create or carry out restrictions in trade or commerce

* * * *

A trust as defined in division (B) of this section is unlawful and void. [Ohio Rev. Code Ann. § 1331.01 (1971).]

TEXAS

Business and Commercial Code

Section 15.02.

* * * *

(b) A "trust" is a combination of capital, skill, or acts by two or more persons to (1) restrict, or tend to restrict, trade, commerce, aids to commerce, the preparation of tangible personal property for market or transportation, or the free pursuit of a lawful business. [Tex. Code Ann. § 15.02 (Vernon, 1968).]

* * * *

Section 15.03. (a) It is a conspiracy in restraint of trade for . . . (2) two or more persons to agree to boycott, or

threaten not to buy from or sell to, a person because that person buys from or sells to another person. [Tex. Code Ann. § 15.03 (Vernon, 1968).]

* * * * *

Section 15.04. (a) Every monopoly, trust, and conspiracy in restraint of trade, as defined in Sections 15.01, 15.02 and 15.03 of this code, respectively, is illegal and prohibited. [Tex. Code Ann. § 15.03 (Vernon, 1968).]

WASHINGTON

Code

Section 19.86.030. Every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is hereby declared unlawful. [Wash. Rev. Code Ann. § 19.86.030 (Supp. 1970).]

WISCONSIN

Statutes

Section 133.01. (1) Every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is hereby declared illegal. [Wis. Stat. Ann. § 133.01 (West. 1957).]

APPENDIX B

NATIONAL BASKETBALL ASSOCIATION

September 2, 1971

Lawrence Fleisher, Esq.
15 Columbus Circle, 6th floor.
New York, N. Y.

Dear Mr. Fleisher:

By this letter, the National Basketball Association states in detail an offer embracing proposals heretofore made to the NBA Players Association through you as its representative, as clarified hereinafter. The proposals relate to Article 22 of the NBA Uniform player contract.

Preliminarily, permit me to advise you of a decision reached by the Board of Governors and independent of this offer. Subject to approval by the Players Association, which we assume will not be withheld, when a club exercises its option to renew an existing contract, the authority reserved therein by the club to reduce the compensation for the option year by as much as 25 percent will not be exercised. The compensation during the option year will remain the same as for the preceding season, and the provision in Article 22 permitting a reduction of up to 25 percent in compensation payable during the option year will be omitted from future player contracts.

Further permit me to advise you that it is the position of the NBA that Article 22 permits but a single exercise of an option to renew for one year, and that the contract if so renewed carries with it no further option to renew. NBA interprets Article 22 to mean that if a player plays out his option year, he is a free agent.

On behalf of NBA, I now set out the following five-point offer to the NBA Players Association:

1. The term of a rookie contract shall be for one year with an option in the club to renew the contract for

a single additional year at no reduction in compensation unless the club and the player involved agree on a longer term.

2. No option provision will be included in future contracts with veterans. A veteran is a player whose rookie contract has expired.

3. The option provision will remain in existing contracts.

4. Until the player has played the last game (including the last playoff game, if applicable) of the last season covered by his contract (and the option year, if any), he may not negotiate, or discuss terms of employment, with any club other than his own employer. Before a free agent whose contract has expired signs with another club, the former club, by meeting the highest offer made to the player, shall have the right to retain such player and sign him to a new contract.

5. If a player who has become a free agent by reason of the expiration of his contract signs with another club, a limited compensation shall be paid by the signing club to the club to which the player was formerly under contract, such compensation to be determined under the following procedures and principles:

   A. A three-member arbitration panel shall be established to which all such compensation cases shall be referred. The NBA Players Association and the Commissioner shall each select one member and the two members so selected shall select the third member, who shall chair the panel. In the event the third member is not agreed upon within 30 days, the third member shall be selected by the President of the American Arbitration Association. A vacancy in the panel shall be filled by the appropriate appointing authority.

B. In the determination of compensation, the following principles shall govern:

1. Impact of the transfer of the player upon the attendance and revenues from all sources of the club to which the player involved was under contract (the former club).

2. Impact of the transfer of the player upon the competitive ability of the former club.

3. Evidence of any special costs incurred by the former club, such as unusual and exceptional promotion activities designed to enhance the value of the player to the club.

4. The arbitrators shall not consider the difference between the level of contract payments to the player by the former club and the level of contract payments to be paid him by the club with which he has signed.

5. The arbitrators shall not award compensation so substantial as materially to discourage the movement of players from one club to another.

C. A compensation award by the arbitration panel, arrived at by the application of the foregoing principles, may be in the form of money, draft choices, assignment of player contracts, or any combination thereof as the decision specifies.

D. A decision of a majority (two) of the arbitrators shall constitute the decision of the arbitration panel.

However, in the event a majority of the arbitrators are unable to agree, the determination of the neutral arbitrator shall constitute the arbitration decision.

E. The expenses of each case shall be born equally by the two clubs.

The arbitration plan is designed to help maintain balanced competition among highly motivated and skilled teams. Balanced competition is the single, most important element in fan appeal. Without a widespread public demand for the sport, there can be neither clubs nor players. Conditions reasonably designed to foster balanced competition are, therefore, the legitimate concern of the general public as well as the clubs and the players.

The arbitration plan is important to balanced competition. Its aim is to provide a reasonable measure of compensation for the loss suffered by a club and by its remaining players and by its fans, if top stars sign with another club. But the arbitration plan does not seek that aim at the expense of a player's right, upon the expiration of his contract, to bargain freely for benefits commensurate with his ability. It bans the award of compensation to the former club at a level so high as to discourage the movement of players; and it excludes market value as an element of that award. It is, therefore, a reasonable step toward maintaining basketball as America's most widespread major professional team sport.

I need not emphasize something that both you and the members of the Players Association know, namely, the importance which NBA places on a merger of the two leagues. That and the draft are necessary elements to the preservation and growth of professional basketball as a highly competitive fan-oriented sport. Important also is the arbitration plan. Without these elements the public, the players and the owners will ultimately suffer by a weakening of the attractiveness of the sport. We, therefore, urge the Players Association to consider this offer in the serious spirit in which it is tendered. While we hope to pursue this offer with you at once, there can, of course, be no final agreement until we know the direction in which Congress is moving on the merger issue.

I am prepared immediately to discuss each element of this offer further with you.

May I have your early response.

Sincerely yours,

/s/ EDWARD S. NASH
Chairman
NBA Negotiation Committee